Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

TERESA ANN GATES,

Petitioner,

versus

FORREST GENERAL HOSPITAL, VICKI FERNICOLA PEVSNER,

Individually and Officially

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED REVIEW

Is Summary Judgment appropriate in an Age Discrimination case when it has been conceded by the Lower Court itself that a *prima facie* case has been established?

When it has been conceded by the Lower Court that certain "speech" is entitled to First Amendment Protection, if one is not immediately terminated for the speech, but one is immediately treated by her employer to a hostile, abusive work environment, is one entitled to relief pursuant to 42 U.S.C. Section 1983?

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Petitioner, Teresa Ann Gates, respectfully requests that the Court grant a Writ of Certiorari to review the *en banc* decision of the United States Court of Appeals for the Fifth Circuit.

DECISIONS BELOW

The unreported decision of the Fifth Circuit of the United States Court of Appeals is set forth in the appendix, (1a). The U.S. Court of Appeals for the Fifth Circuit, on November 3, 1999 denied Ms. Gate' Petition for Rehearing and Rehearing En Banc. That decision is also unreported. The original decision rendered matter in the United States District Court for the Southern District of Mississippi is also unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. On May 11, 1998, the Southern District Court of Mississippi, Hattiesburg Division, granted Summary Judgment. A timely appeal was filed in the Fifth Circuit in the United States Court of Appeals. The Fifth Circuit affirmed the Decision. Both a panel hearing and rehearing en banc were timely requested. The rehearing was denied on November 3, 1999. This petition was timely filed within 90 days of the panel rehearing denial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Age Discrimination Employment Act (A.D.E.A) [29 U.S.C. Section 623 (a)]

"It shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . .

42 U.S.C. Section 1983

Section 1 of the Civil Rights Act of 1861, 42.U.S.C. Section 1983, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and the laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress . .

First Amendment of the United States Constitution

Religious and Political Freedom

Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government or a redress of grievance.

STATEMENT OF THE CASE

Petitioner, Ms. Teresa Ann Gates, was an employee of Forrest General Hospital (Hospital) when she spoke out about public

concern regarding patient abuse at the Hospital as well as supervisors literally having sexual relations on the premises of the hospital. This matter also involves blatant age discrimination essentially because it involves "direct evidence" of discrimination in that Ms. Gates was specifically told by her supervisor that the hospital "wished to hire a YOUNGER person for less money."

Upon Ms. Gates' complaining about the patient abuse and the inappropriate sexual actions on the premises of the hospital, she was promised "dire consequences" immediately. Then, in a pattern and practice of mistreatment of her by her supervisors, she was consistently harassed, embarrassed, humiliated, and mistreated. It is not disputed that the actual quality of Ms. Gates work was exemplary.

Ms. Gate's function at the hospital essentially consisted of supervising teachers, planning educational programs, marketing hospital resources, and, in particular, marketing the "Pine Grove facility" which provided, among other things, psychological counseling.

As soon as Ms. Gates reported the wrongdoing regarding patient abuse and complaining about her supervisors having sexual relations on the premises, one of her supervisors, Ms. Pevsner, did all that she could to have Ms. Gates quit. However, Ms. Gates "hung in" and did not quit.

Ultimately, Ms. Gates was replaced by a substantially younger woman who was 33 years old. Ms. Gates was over the age of 50 at the time she was constructively discharged. It is not disputed by the hospital that Ms. Gates was, at least, as qualified as her replacement.

Ultimately, Ms. Gates was told that the hospital wanted a "younger person". Then, Ms. Gates hours were reduced to the point

that she could not support herself, and she was compelled to resign. Consequently, she was constructively discharged.

The Defendants had one contention in response to the contentions of Ms. Gates: the Defendants contended that Ms. Gates would not work 12 months. Ms. Gates has consistently disputed this. She disputes it to this day.

In Ms. Gates complaint, she contended that she has been deprived of her employment for exercising her First Amendment Rights and, therefore, she is entitled to relief pursuant to 42 U.S.C. Section 1983. Furthermore, she sought relief pursuant to the Age Discrimination Employment Act (A.D.E.A.) because she was specifically told that she was the victim of age discrimination in that the hospital wanted to hire "a younger person". She was replaced by a person substantially younger than her.

Subsequently, the District Court granted Summary Judgment on May 11, 1998. On June 23, 1998 her Motion for Reconsideration was denied.

Upon an appropriate appeal being perfected, on September 24, 1999 the three Judge panel of the Fifth Circuit of the United States Court of Appeals affirmed the decision of the Lower Court .

On November 3, 1999, the Fifth Circuit also denied Ms. Gates Petition for Rehearing and her Petition for Rehearing En Banc.

The petitioner has filed a Petition for Certiorari to the United States Supreme Court based upon the issues and argument presented herein.

REASONS FOR GRANTING THE WRIT

I.

I. IS SUMMARY JUDGMENT APPROPRIATE IN AN AGE DISCRIMINATION CASE WHEN IT HAS BEEN CONCEDED

BY THE LOWER COURT ITSELF THAT A PRIMA FACIE CASE HAS BEEN ESTABLISHED?

The standards applied in the Circuits are conflicting as those standards pertain to *Title VII* discrimination matters. The burden is simply too heavy for a complaining party in a discrimination case to survive a Motion for Summary Judgment. This is especially true in the Fifth Circuit.

The Federal Rules of Civil Procedure are very clear. The only requirement to survive a Motion for Summary Judgment is simply that there be a genuine of issue of material fact. See Rule 56 Federal Rules of Civil Procedure (F.R.C.P.). Yet, that burden has become much heavier in the Fifth Circuit. For example, the Fifth Circuit readily acknowledges here that Ms. Gates established a *prima facie* case, and she "has produced sufficient competent Summary Judgment evidence to establish a *prima facie* case, albeit controverted by deposition testimony of the Defendants, of age discrimination relative to her discharge from that position in September 1996." (p. 2 a of appendix 1). The Court acknowledged the following: 1. Gates was discharged; 2. she was qualified for the position; 3. she was within the protected class at the time of discharge (over 40 years of age) and 4. she was replaced (i) by someone outside the protected class (ii) by someone who was younger.

Additionally, Ms. Gates also offered evidence that she was specifically told by her immediate supervisor that the hospital wanted " someone younger at a lower salary to replace her".

In spite of the foregoing, according to the Fifth Circuit, Ms. Gates is not even entitled to present her case to the Finder of Fact. The Fifth Circuit essentially held that a "reasonable jury" would not find in favor of Ms. Gates.

Consequently, if this case is allowed to stand, especially with "direct evidence" of discrimination, the Fifth Circuit, and all of the

district courts it embraces, have essentially unfettered, unbridled discretion to wipe away discrimination complaints and conclude arbitrarily, that a "reasonable jury" would find this or that. This position contradicts the directives of the Federal Rules of Civil Procedure at Rule 56 as well as, essentially speaking, the Due Process Clause of the United States Constitution which provides that there be a meaningful notice and a meaningful hearing regarding one's complaints -- particularly when one's complaints deal with whether one has been provided equal protection under the laws and whether *Title VII* has been violated.

The other Circuits do not agree with the Fifth Circuit. For example, the Second Circuit only requires a "de minimis burden." Dister v. Continental Group Co. Inc., 859 F 2d 1108, 1114 (2nd Cir. 1988). The Second Circuit standard defines the trial Court's task at the Summary Judgment Motion stage as being "carefully limited to discern whether there are any genuine issues of material fact to be tried, not to deciding them." Gallo v. Prudential Srvs., 22 F 3d 1219, 1224 (2nd Cir. 1994).

As the Second Circuit stated in Dister, upon referring to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), the actual requirement which emanates from this Court, is that there only be "concrete evidence from which a jury **could return** a verdict in his favor." Now, the Fifth Circuit appears to have steered away from that standard. Surely, if a Trier of Fact hears evidence which, point blank, establishes age discrimination if believed by the Trier of Fact, it is literally impossible to conclude that a Trier of Fact "could not" conclude that age discrimination was a contributing factor to the treatment and termination of Ms. Gates.

The Fourth Circuit requires that the complainant should be given "the benefit of all permissible inferences; it is the jury's job at trial to weigh the evidence, not the Courts' business to do so at Summary Judgment." Tuck v. Henkel Co., 973 F 2d 371, 377 (4th

has also stated that "Courts must take special care when considering a Motion for Summary Judgment in a discrimination case because motive is often the critical issue." Evans v. Technologies Applications & Serv. Co., 80 F 3d 954, 958, (4th Cir. 1996).

The Seventh, Eighth and Tenth Circuits have all held that "credibility assessments are inappropriate at Summary Judgment." EEOC v. United Parcel Serv., 94 F. 3d 314, 319-20 (7th Cir. 1996); Oldham v. West, 47 F. 3d 985, 988-89, (8th Cir. 1995); Tomsic v. State of Riviera Beach, 85 F. 3d 1472, 1478 (10th Cir. 1996).

In the Eleventh Circuit, the only real question is whether a fact question existed. Lyes v. City of Riviera Beach, 126 f. 3d 1380, 1386 n. 11 (11th Cir. 1997).

The District of Columbia Circuit also has held that the Fact Finder must answer comparative credibility questions regarding discrimination. Aka v. Washington Hosp. Ctr., 116 F 3d 876 (D.C. Cir. 1997).

Here, we have: direct evidence, a *prima facie* case, numerous age - related comments by her supervisor, and she was replaced by a much younger woman who was clearly less qualified than her. Yet, Plaintiff is not allowed to present her case to a jury. We submit that the Summary Judgment standard utilized here conflicts with the appropriate standards emanating from the Supreme Court and the other Circuit Courts.

II.

WHEN IT IS CONCEDED BY THE LOWER COURT THAT CERTAIN "SPEECH" IS ENTITLED TO FIRST AMENDMENT PROTECTION, IF ONE IS NOT IMMEDIATELY TERMINATED FOR THE SPEECH, BUT ONE IS IMMEDIATELY TREATED BY HER EMPLOYER TO A HOSTILE, ABUSIVE WORK ENVIRONMENT, IS

ONE ENTITLED TO RELIEF PURSUANT TO 42 U.S.C. SECTION 1983?

The Hospital agreed that the Federal Court also had jurisdiction pursuant to 42 U.S.C. Section 1983. As this Court is keenly aware, a state entity such as the hospital, can not act "under color of state law" and deprive a Plaintiff of a Right guaranteed by the United States Constitution or by Federal statutes. If this occurs, of course, 42 U.S.C. Section 1983 is violated. Here, Ms. Gates reported brutal patient abuse on the premises of the hospital and was repeatedly threatened with "dire consequences" by her supervisor in regard to her reports, complaints, and concerns. She was fired for two reasons: the first was her age, and secondly, she exercised her First Amendment Rights. Her evidence essentially consisted of her direct supervisor threatening her with "dire consequences" by her continuing to complain about the patient abuse and then those "dire consequences" were realized by an immediate long course of harassment which was designed to force her to quit. The two other ladies who also complained about the patient abuse immediately quit. However, Ms. Gates managed to withstand the harassment until it became unbearable. Thus, she established a constructive discharge situation. Bourque v. Powell Elec. Mfg. Co., 617 F. 2d 61 (5th Cir. 1980).

The predominant case regarding this issue appears to be this Court's ruling in Connick v. Myers, 461 U.S. 138 (1983). Connick essentially states that an employee who speaks out about matters of "public concern" is entitled to First Amendment guarantees. Id. at p. 146. In the following cases the Court has consistently held that an employee who is fired or punished for the exercise of First Amendment Rights has lost "liberty" without due process of law. Pickering v. Board of Education, 391 U.S. 563 (1968), Perry v. Sindermann, 408 U.S. 593 (1972), Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 272 (1977).

In spite of the foregoing, the Fifth Circuit stated essentially that, since Ms. Gates did not immediately quit, she was not entitled to any relief. She was not even entitled to present her case to the Finder of Fact. This ruling appears to be in conflict with the considerable body of law, established supra, regarding this issue.

Here the "dire consequences" included being moved from her position, reducing her pay, throwing her desk contents into a hallway, being habitually screamed at by her supervisor, and castigated on a daily basis. The Fifth Circuit concluded that, although "Ms. Gates criticism of hospital co- employees for patient abuse and sexual misbehavior was "protected" speech, she must also produce reasonably probative evidence that her speech caused the retaliatory employment decision about which she complains. (p.5a, Appendix A). Jones v. Collins, 132 F 3d 1048, 1053 (5th Cir. 1998).

Once again, speaking metaphorically, if a supervisor tells you she is going to shoot you, and then she shoots you, the standard of "reasonable probative evidence" must be impossible to attain. Ms. Gates was promised "dire consequences" and certainly received "dire consequences". Yet, since she was not actually fired or constructively discharged until later, thanks to her own grit and determination, the Fifth Circuit informs that she is entitled to no relief and can not present her case to a Finder of Fact.

This ruling conflicts with the foregoing authorities, and we respectfully ask that this Court consider it anew.

CONCLUSION

The Court should grant *Certiorari* to review this important matter and reverse the Fifth Circuit Court of Appeals. The Petitioner respectfully asks that this Honorable Court clarify that, in a *Title VII* case and in any case involving issues of intent, especially when a prima facie case has undisputedly been established, the Trier of Fact

should have the opportunity to render the final disposition regarding the matter at hand.

Respectfully Submitted,

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APPENDIX A– OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60451

Theresa Ann Gates,

Plaintiff - Appellant,

v.

Forrest General Hospital; Vicki Fernicola Pevsner, Individually and Officially

Defendants - Appellee

Appeal from the United States District Court
For the Southern District of Mississippi

Submitted: _____

Filed: _____

Before REAVLEY, HIGGINBOTHAM, and DENNIS, Circuit Judqes. PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5THCIR. R. 47.5.4.

Appendix A

Theresa Gates appeals the district court's grant of summary judgment for the defendants dismissing with prejudice her claims under the Age Discrimination Employment Act (ADEA) and under 42 U.S.C. § 1983 for deprivations of First Amendment (free speech) and

I.

Fourteenth Amendment (liberty and property interests) protections. The claims arise from alleged adverse employment actions taken by the defendant employer Forrest General Hospital and the defendant supervisor Vicki Pevsner.

Having fully reviewed the briefs and the record and having heard oral argument by the parties, we affirm for substantially the reasons expressed by the district court in its memorandum opinion and order dated May 11, 1998, except for several elements with which we disagree that do not amount to reversible error.

With respect to the ADEA claims, in order to establish a prima facie case of age discrimination, Gates must demonstrate that she (1) was discharged; (2) was qualified for the position; (3) was within the protected age class -- over 40 -- at the time of discharge; and (4) was replaced by a younger person, or a person outside the protected age class, or otherwise was discharged because of her age. See Stults v. Conoco, Inc., 76 F.3d 651, 656 n.2 (5th Cir. 1996).

First, appellant's age discrimination claim that she was discharged in May 1996 from her position as Education Coordinator is without merit, as the district court properly found. Because only a small part of her duties as Education Coordinator were assigned to another employee already performing other duties as Therapy Coordinator, appellant

cannot be considered as having been replaced by another employee. See Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir.), cert. denied, 498 U.S. 878 (1990)(a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties).

Second, regarding the ADEA claim premised upon appellant's alleged discharge as full-time Outreach Coordinator, we differ with the trial court and find that appellant, through her own deposition testimony regarding her acceptance of an offer of that position in May 1996 and her expressed willingness to work year around in that position, has produced sufficient competent summary judgment evidence to establish a prima facie case, albeit controverted by deposition testimony of the defendants, of age discrimination relative to her discharge from that position in September 1996: (1) Gates was discharged; (2) she was qualified for the position; (3) she was within the protected class at the time of discharge (over 40 years of age); and (4) she was replaced (i) by someone outside the protected class and (ii) by someone who was younger. See Stults, 76 F.3d at 656 n.2. However, we agree with the district court that Gates has failed to produce sufficient evidence from which a reasonable jury could conclude that appellees, proffered legitimate and nondiscriminatory reasons for the discharge (i.e. that the replacement worker was more qualified by experience and by education, would cost less money to employ, and was happy to work summers) were mere pretext. In the record presented for summary judgment purposes, Gates testified to a single statement made to her by Pevsner to the effect that "you would make too much money if I let you work twelve months." Gates also testified to her own conclusion that Pevsner "had hired someone younger at a lower salary to replace me."2* This evidence was not sufficient within the context of this case to create a reasonable inference that age

was a determinative reason for the employment decision.3* Id. at 657 (citing Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc)) . For example, seven of nine Outreach Coordinators employed by Forrest General at the time of the employment action were within the protected class; Gates had been offered other full-time and part-time employment opportunities; and, Gates continued to work full-time through November 1996 and part-time through June 1997. Moreover, employer decisions predicated upon salary considerations are not indicative of age discrimination. Armedariz v. Pinkerton Tobacco Co., 58 F.3d 144, 152 (5th Cir. 1995). Gates has failed to produce evidence from which it may be reasonably inferred that the defendants' proffered reasons were mere pretext.

Regarding appellant's First Amendment claim, we disagree with the district court that Gates's criticism of hospital co-employees

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2* Gates seeks to rely on her testimony quoted in her "record excerpts" to show that Pevsner said she could "hire a younger person for less money." Gates's testimony to this effect, However, is not part of the summary judgment record.

3* This was the only evidence of age discrimination attributed by Gates to Pevsner. Because age-related remarks are sufficient evidence of age discrimination only if uttered by the individual with authority over the employment decision at issue, See Brown v. CSC Logic, Inc., 82 F.3d 651, 655-56 (5th Cir. 1996), age-related statements by co-employees other than Pevsner, the supervising authority with control over personnel decisions such as hiring, firing, transfers, etc., are not relevant.

for patient abuse and sexual misbehavior was necessarily unprotected because it had not been made publicly or to the news media. However, even if it were assumed that her expressions were protected, Gates must also produce reasonably probative evidence that her speech caused the retaliatory employment decision about which she complains. See Jones v. Collins, 132 F.3d 1048, 1053 (5th Cir. 1998). Gates failed in this respect. Given the temporal remoteness of the "speech" (1994) from the "constructive discharge" (June 1997), as well as the intervening superlative personnel evaluations and offers of employment in various capacities, a reasonable trier of fact could not find a causal link between the two events. The same is true even if the May 1996 alleged discharge as Education Coordinator or the September 1996 alleged discharge as Outreach Coordinator are considered as the end points for causation analysis purposes. The expression at issue was too remote from the employment decisions complained of to support a reasonable inference of causation.

For the foregoing reasons, the district court grant of summary judgment in favor of appellees is AFFIRMED.